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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

CONSTANTINO BASILE,

Plaintiff,

v.

SOUTHWEST AIRLINES CO., *et al*,

Defendants.

Case No. 2:15-cv-01883-RFB-VCF

ORDER

This action, filed by Plaintiff Constantino Basile (“Plaintiff”) was commenced on October 1, 2015. (ECF No. 1). In the operative Amended Complaint (ECF No. 56), Plaintiff asserts the following causes of action against Defendant Southwest Airlines Company (“Defendant”): (1) defamation; (2) recklessness; (3) intentional infliction of severe emotional distress; (4) breach of implied contract; (5) breach of implied covenant of good faith and fair dealing; and (6) civil conspiracy. The Court held a hearing on Defendant’s Motion to Dismiss (ECF No. 58) on March 6, 2017, and dismissed on the record all of Plaintiff’s claims except the defamation claim.

Plaintiff filed a Motion for Reconsideration (ECF No. 74) and both parties filed Motions for Summary Judgment (ECF Nos. 78, 85). On January 27, 2018, the Court denied these motions, and reopened discovery for a period of 75 days, and shortly thereafter ordered the parties’ appearance at a hearing regarding discovery. (ECF No. 99). The hearing was held on February 6, 2018. At the hearing, the Court provided guidance to the parties regarding the depositions of several Southwest employees. The Court also permitted Defendant to file a motion to compel

1 neuropsychological examination of Plaintiff.¹ On February 21, 2018 Defendant filed the Motion
2 to Compel. (ECF No. 108). Plaintiff filed a Response on February 26, 2018. (ECF No. 111).
3 Defendant filed a Reply on March 2, 2018. (ECF No. 113). Magistrate Judge Cam Ferenbach
4 granted the motion on March 14, 2018, and also ordered Plaintiff to respond to Defendant's
5 Interrogatories 1-2 and 7-14 by March 30, 2018. (ECF No. 114). The neuropsychological
6 examination was set to take place beginning at 9:00am on April 7, 2018. Following Plaintiff's
7 failure to complete the examination, on April 10, 2018, Defendant filed a Motion for Sanctions or
8 Alternatively Motion to Limit Testimony. (ECF No. 115). The same day, Plaintiff filed a Motion
9 to Compel. (ECF No. 116). Plaintiff filed a Response to the Motion for Sanctions on April 23,
10 2018. (ECF No. 118). Defendant filed a Reply on April 26, 2018. (ECF No. 121). Magistrate Judge
11 Ferenbach entered a Report and Recommendation on May 3, 2018, recommending that
12 Defendant's [115] Motion be granted and Plaintiff be precluded from presenting evidence at trial
13 regarding any damages related to his mental state. (ECF No. 122). In the order, Magistrate Judge
14 Ferenbach also denied Plaintiff's Motion to Compel. Objections to the Report & Recommendation
15 were due on May 17, 2018. No objections were filed.

16 A district court "may accept, reject, or modify, in whole or in part, the findings or
17 recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). A party may file specific
18 written objections to the findings and recommendations of a magistrate judge. 28 U.S.C. §
19 636(b)(1); Local Rule IB 3-2(a). When written objections have been filed, the district court is
20 required to "make a de novo determination of those portions of the report or specified proposed
21 findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); see also Local
22 Rule IB 3-2(b). Where a party fails to object, however, a district court is not required to conduct
23 "any review," de novo or otherwise, of the report and recommendations of a magistrate judge.
24 Thomas v. Arn, 474 U.S. 140, 149 (1985).

25 Although Plaintiff failed to file objections to the Report & Recommendation, the Court has
26 nonetheless reviewed the record in this case and concurs with Judge Ferenbach's recommendation
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28 ¹ At the hearing, Plaintiff consented to undergoing the examination.

1 to grant Defendant's Motion for Sanctions and deny Plaintiff's Motion to Compel. The Court also
2 imposes an additional sanction, and now precludes Plaintiff from proceeding on presumed
3 damages. Federal Rule of Civil Procedure 37(b)(2) permits the Court to impose a variety of
4 sanctions, including prohibiting a disobedient party from supporting its claims or introducing
5 evidence, due to a party's failure to obey a discovery order, such as an order under Rule 35.
6 Plaintiff asserts a claim for defamation *per se*, and damages are typically presumed for such claims.
7 See Pope v. Motel 6, 114 P.3d 277, 282 (Nev. 2005) (finding that "[a] false statement involving
8 the imputation of a crime has historically been designated as defamatory *per se*" and therefore
9 proof of damages is not required). However, the Court finds it appropriate to prohibit Plaintiff
10 from asserting presumed damages. Plaintiff, as conceded at hearings in this case, has no expert
11 testimony or other testimony or evidence of presumed damages besides his own assertions of
12 alleged mental anguish. The success of Plaintiff's defamation *per se* claim therefore rests on his
13 credibility, which Defendants cannot now meaningfully challenge due to Plaintiff's failure to
14 complete the neurological examination. The Court also agrees with Judge Ferenbach's finding that
15 ordering Plaintiff to complete another examination would be fruitless, and would serve only to
16 further delay a case in which Plaintiff has repeatedly been uncooperative.

17 Because there is no means for Plaintiff to prove actual damages or assert presumed
18 damages, the Court finds that Plaintiff cannot establish a defamation claim and therefore dismissal
19 of this action is warranted. The Court does not lightly impose this further sanction, but finds that
20 Plaintiff's conduct throughout this litigation and culminating in his unilateral termination of the
21 neurological examination warrants dismissal. At multiple stages in this case, Plaintiff has
22 disregarded this Court's orders and the Federal Rules of Civil Procedure and engaged in litigation
23 conduct pursuant to his own whim. Based upon the Court's own observations of Plaintiff in
24 hearings, the Court finds credible Defendant's contention that Plaintiff has continued to refuse to
25 engage in meaningful and required conference on litigation issues.

26 On March 28, 2017, the Court entered a Discovery Plan and Order with clear instructions
27 to the parties on setting depositions. (ECF No. 82). This Discovery Plan and Order incorporated
28 the oral rulings and instructions issued by the Court on March 6, 2017. (ECF No. 70). While it is

1 not the Court's normal practice to permit parties to conduct depositions at the courthouse, the Court
2 made an exception to accommodate the parties as the Defendant had legitimately raised concerns
3 about Plaintiff's conduct given his interactions with its employees. However, before having sat for
4 a deposition or conducting any discovery, Plaintiff filed a Motion for Summary Judgment on
5 March 27, 2017. (ECF No. 78). Plaintiff was deposed in May 2017, but did not conduct the
6 depositions of the witnesses he sought to depose. The Court had set depositions despite
7 Defendant's objections and the Court had set forth special procedures for the taking of the
8 deposition. Plaintiff refused to respond to Defendant's communications about the taking of the
9 depositions. However, as Plaintiff is representing himself and given his claims scheduling
10 difficulties, the Court reopened discovery over the Defendant's objection for 75 days on January
11 27, 2018. (ECF No. 99). The Court held a hearing on February 6, 2018 to ensure that the parties
12 understood the Court's order on discovery. (ECF No. 109). Despite this guidance, Plaintiff
13 willfully failed to meaningfully participate in the neuropsychological examination, and unilaterally
14 terminated it.

15 The Court recognizes that "dismissal is a harsh penalty and, therefore, it should only be
16 imposed in extreme circumstances." Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992), as
17 amended (May 22, 1992) (citation omitted). In applying the five-factor test set forth by the Ninth
18 Circuit, the Court finds that this case presents the extreme circumstances warranting dismissal. Id.
19 at 1260-61 ("In determining whether to dismiss a case for failure to comply with a court order the
20 district court must weigh five factors including: '(1) the public's interest in expeditious resolution
21 of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants;
22 (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less
23 drastic alternatives.'") (citation omitted). The Court finds that these factors weigh in favor of
24 dismissal. This case has been litigated for nearly three years, and Plaintiff has caused delays at
25 multiple junctures. Both the public interest and judicial economy are served by dismissing this
26 case. Defendant is prejudiced in part because, as discussed above, Defendant cannot adequately
27 prepare its defense to damages without the results from the neuropsychological examination.
28 Further, a presumption of injury arises from the occurrence of unreasonable delay in filing a

1 pleading ordered by the court or prosecuting an action. See Anderson v. Air West, 542 F.2d 522,
2 524 (9th Cir. 1976). The public policy favoring disposition of cases on their merits has been
3 satisfied; not only has this action survived a Motion to Dismiss, the Court has permitted multiple
4 rounds of summary judgment briefing and reopened discovery in light of Plaintiff's scheduling
5 difficulties and in recognition of the challenges faced by pro se litigants. Finally, the Court need
6 not further consider alternatives where it has already implemented them. Ferdik, 963 F.2d at 1262.
7 Plaintiff filed a Motion for Summary Judgment without conducting any discovery, before his own
8 deposition even took place, and in disregard of the Court's oral instructions. Rather than dismissing
9 the action, the Court denied both parties' motions for summary judgment, provided renewed
10 guidance to the parties in a written Order, and set a hearing to permit the parties to request any
11 additional clarification they needed.

12 The Court must be able to "manage [its] docket[] without being subject to the endless
13 vexatious noncompliance of litigants like [Plaintiff]." Id. at 1261. While the sanction of dismissal
14 should rarely be imposed, this matter is one in which such sanction is warranted.

15 **IT IS THEREFORE ORDERED** that the Report and Recommendation (ECF No. 122)
16 is ACCEPTED and ADOPTED in full. Plaintiff is precluded from presenting evidence regarding
17 damages related to his mental state, and is further precluded from asserting presumed damages.

18 **IT IS FURTHER ORDERED** that this action is DISMISSED WITH PREJUDICE.
19 Because Plaintiff has no means of establishing damages, he cannot prevail on his sole claim of
20 defamation. All pending motions are denied. The Clerk of Court is instructed to enter judgment
21 accordingly and close this case.

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23 DATED: July 10, 2018.

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25 **RICHARD F. BOULWARE, II**
26 **UNITED STATES DISTRICT JUDGE**
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